

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JENNER PATRICK SHOOP,

Petitioner,

v.

RON VAN BOENING,

Respondent.

Case No. C06-5523 RBL/KLS

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
April 6, 2007**

This 28 U.S.C. § 2254 petition for habeas corpus relief has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636 (b) and Local MJR 3 and 4. Petitioner seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254. (Dkt. # 4). Respondent has answered (Dkt. # 14) and Petitioner has replied (Dkt. # 16). This matter is now ripe for review. After careful review, the undersigned recommends that the petition be denied with prejudice.

**I. BASIS FOR CUSTODY**

Petitioner is in custody of the Washington Department Corrections (DOC) pursuant to his 2004 convictions, by plea on May 19, 2004 to the separate charges of second-degree assault (filed in 2003) and residential burglary (filed in 2004) (both with deadly weapons enhancements). (Dkt.

# 15, Exhs. 1, 2). The Petitioner is challenging his conviction in the second-degree assault case only.

## II. STATEMENT OF THE CASE

### A. Statement of Facts

The State of Washington's declaration for determination of probable cause summarized the facts of the second-degree assault case as follows:

That in Pierce County, Washington, on or about the 19<sup>th</sup> day of August, 2003, the defendant, JENNER PATRICK SHOOP, did commit the crime of Assault in the Second Degree.

At approximately 6:00 p.m., Timothy Lauzon and Alex Bolvin went to 9418 Glen Cove Rd KPN, Vaughn, Washington, to contact the defendant. The defendant owed Bolvin \$30.00 and had borrowed a motorcycle from Lauzon. The defendant apologized to Bolvin for not having the money that he owed him and told Lauzon that he had sold the motorcycle, but did not have any money to show for it. The defendant and Lauzon began to argue. The defendant walked back inside the residence and came back to the door moments later with a baseball bat. He slammed the bat against an object on the porch and continued to argue with Lauzon. The defendant then swung the bat in an attempt to strike Lauzon but Lauzon was able to grab the bat and hold it with his left hand. The defendant produced a knife with his left hand and attempted to stab Lauzon, who lifted up his right arm in an attempt to shield his face and head. The defendant stabbed Lauzon on the outer portion of his right forearm, severely lacerating the arm. Lauzon dropped the bat, turned and ran down the road with the defendant chasing him with the bat. Bolvin ran to his truck, drove down the road and picked up Lauzon. The police were called. Lauzon was transported to Tacoma General Hospital for treatment of his injuries. Deputies attempted to locate the defendant, who had fled on foot, but were unable to do so.

(Dkt. # 15, Exhs. 4).

### B. State Court Procedural History

On May 3, 2005, Petitioner filed his personal restraint petition, raising the following grounds for review:

1) The Superior Court erred [sic] in Violation of petitioners 6<sup>th</sup> Amendment right due to the Ineffective Assistance of Counsel. AMENDMENT VI (6) "Right to Speedy trial, witnesses, etc." In all criminal prosecutions, the accused shall enjoy the

1 right to have compulsory process for obtaining witnesses in his favor, and to have the  
2 assistance of counsel for his defense.

3 2) The Superior Court also violated Petitioners Due Process rights of the 5<sup>th</sup> and 14<sup>th</sup>  
4 Amendments. AMENDMENT V (5) "Right of accused in criminal proceedings." No  
5 person shall be compelled in any Criminal case to be a witness against himself, nor be  
6 deprived of life, liberty, or property, without due process of Law. AMENDMENT  
7 XIV (14) "Citizenship rights not to be Abridged by the State." No state shall make or  
8 enforce any law which shall abridge the privileges or immunities of citizens of the  
9 United States; nor shall any state deprive any person of Life, liberty, or property,  
10 without due process of law; nor deny to any person within its jurisdiction the equal  
11 protection of the law.

12 A. 1) The victim came to my home to collect a debt. Evidence 1<sup>B</sup>

13 2) The victim became aggressive and argumentative. Evidence 1<sup>B</sup>

14 3) After the incident occurred I followed the aggressor off the property and  
15 stopped. This is in the handwritten statement form Alex Bolvin taken by  
16 Pierce County sheriff. Alex is the friend of the victim. This statement was in  
17 the file. Evidence 1<sup>B</sup>

18 B.1) In the file, my first attorney Karen Lundahl sent a memo to Jim Harris of  
19 Harris Investigations saying, "this would seem to be a self-defense case."  
20 Evidence 1<sup>A</sup>

21 2) In the file, interview after interview of facts like, the victim Tim Lazone had  
22 been escorted off the property and told not to come back this is in the  
23 interview with Rick Sorrels and Jan Shoop. Evidence 3 & 4<sup>A</sup>

24 3) I never attacked the victim and I only armed myself after I felt threatened.  
25 The victim approached me and pushed me to the ground with a closed fist and  
26 got cut on the top of his forearm. Evidence 4<sup>B</sup> and recorded statement of  
27 Alex Bolvin.

28 2) Chandola's only advice, "ever" was to except the ASLT2 charge because it  
carried less time then the charge for RES burg in which I was facing 63  
months or better, and with the two crimes being run concurrent, (aside from  
the weapon's enhancements) the "one would be swallowed up by the other."

Having never seen any statements any my counsel only a couple times, I feel  
as though I was duped into the plea agreement by my own counsel.

3) He had explosive evidence in the file. My wife, after 7 months of phone calls  
and letters from the both of us, received the files only after promising to call

1 the bar association. (See Evidence 5<sup>B&C</sup>)

2 I knew he was in possession of some statements but only now after reading  
3 them myself am I truly mystified.

4 He made no effort in utilizing any strategy, statement or piece of evidence in  
5 my defense. Had he attempted to defend me and had he proved successful, I  
6 would be serving one less enhancement of 12 months and my point range  
7 would have been lower by one point making my offender score eight instead  
8 of nine on the RES burg bringing down to 53 months instead of 63 months,  
9 not to mention the fact that I now have a violent crime and a strike on my  
10 record.

11 (Id., Exh. 5, p. 16-18).

12 The Court of Appeals dismissed the petition as frivolous. (Id., Exh. 6). Petitioner filed a  
13 motion for discretionary review. (Id., Exh. 7). Petitioner raised the following grounds for review:

- 14 1) The superior court violated petitioner's Sixth Amendment rights to effective  
15 assistance of counsel.
- 16 2) Petitioner's rights to a speedy trial, and to present witness in his behalf, were  
17 violated by the trial court in violation of the Sixth Amendment.
- 18 3) The trial court violated petitioner's Fifth, Sixth and Fourteenth Amendment  
19 rights to due process and denied effective assistance of counsel.
- 20 4) No person shall be compelled in any criminal case to give evidence against  
21 himself.
- 22 5) No state shall make a law or enforce any law which shall abridge the rights  
23 and privileges or immunities of citizens of the United States; nor shall any  
24 state deprive any person or life, liberty, or property, without due process of  
25 the law.
- 26 6) Ineffective assistance of counsel. Counsel failed to inform defendant of all  
27 legal and discovery pertaining to the case.
- 28 7) Ineffective assistance of counsel. Counsel failed to investigate and violated the  
Sixth Amendment.
- 8) Ineffective assistance of counsel. Counsel misinformed, mislead, and coerced  
defendant into pleading guilty to a crime he did not commit.

9) Counsel had defendant confess to a crime he did not commit, and to state to the court a weapon that was not used.

(Id., Exh. 7 at 5).

The Supreme Court denied review. (Id., Exh. 8). Petitioner moved to modify. (Id., Exh. 9). Petitioner presented the following grounds for review:

- 1) The Superior Court erred in violation of Petitioners 6<sup>th</sup> Amendment right due to the Ineffective Assistance of Counsel. AMENDMENT VI (6) In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2) The<sup>th</sup> Superior Court also violated Petitioners Due Process rights of the 5<sup>th</sup> and 14<sup>th</sup> Amendments. AMENDMENT V (5) No person shall be compelled in any Criminal case to be a witness against himself, nor be deprived of Life, liberty, or Property, without Due Process of Law. AMENDMENT XIV (14) No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States of America; nor shall any state deprive any person of Life, Liberty, or Property, without Due Process of Law; nor deny to any person within its jurisdiction the equal protection of the law.

(Id. at 5).

On September 7, 2006, the Supreme Court denied Petitioner's motion to modify. (Id., Exh. 10).

### III. ISSUES PRESENTED

Petitioner presents this Court with the following grounds for relief in his federal habeas petition:

1) Violation of my United States Constitutional right to have Compulsory Process for obtaining witness in my favor, and to have the effective assistance of counsel for my defense under the 6<sup>th</sup> Amendment.

6a (a) Supporting Facts: On March 25, 2004, counsel for the defense is scheduled for an Omnibus Hearing with the accused. Counsel for the defense is cited as, "having other Matters," by Attorney Bar #33758. The Hearing is rescheduled for March 31, 2004, at which time counsel for the defense is

again not present. The Hearing is again rescheduled for April 13, 2004. On April 13, 2004, counsel for the defense cites himself as unprepared and asks the court for a continuance. The court again rescheduled for April 27, 2004. The accused does not receive an Omnibus Hearing. The victim gave a statement accusing the defendant, it was the victims accusation in which the accused was arrested and charged. Counsel for the defense of the accused, denied the accused his assistance when counsel did not attend even one of the many court ordered Omnibus hearings except to say, he is unprepared and unable to assist the accused in his defense. The purpose of this Hearing is to prepare for trial or plea and to determine the extent of discovery to be granted to each party. Counsel for the accused was in possession of several statements to include a statement from witness to the incident Alex Bolvin.

These statements call into question the accusers accusations. At the Omnibus Hearing the prosecution must disclose evidence in its possession favorable to the defendant on the issue of guilt. Its not the duty of the prosecution to disclose such evidence. It's the duty of counsel for the defense to assist the accused in obtaining any such evidence. Due to counsels failure to assist the accused in initiating, let alone completing any kind of discovery, the accused became helpless against the victims accusations and the charges set in motion by the prosecution. Counsel for the defense denied the accused his Constitutional right to Compulsory process for obtaining witness in his favor and rendered no assistance for the defense of the accused, violating the accused's 6<sup>th</sup> Amendment rights.

- 2) Violation of my United States Constitutional right to Due Process of law under the 5<sup>th</sup> Amendment thereto.

March 25, 2004. Denied Omnibus Hearing. New Hearing set for March 31, 2004. I am again denied Omnibus Hearing. New hearing set for April 13, 2004. I am again denied Omnibus Hearing. New hearing set for April 27, 2004. I am again denied Omnibus Hearing. New hearing set for April 29, 2004, I am completely denied everything but the opportunity to plea guilty.

- 3) Violation of my United State Constitutional right that states; no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of Life, Liberty, or Property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws under the 14<sup>th</sup> Amendment.

9a (a) Supporting Facts: Through the actions of counsel for the defense, the accused was denied his Constitutional right to due process of law. The Omnibus Hearing is essential, in relation to due process of law. Its purpose is to prepare for trial or plea, and to determine the extent of discovery to be

1 granted to each party. Without this essential right to due process, nothing  
2 stands between the accused and imminent prosecution. Denial of an Omnibus  
3 Hearing because the accused cannot produce counsel for his defense is a kind  
4 of double jeopardy. The accused being ignorant of the law, and his rights,  
5 depends upon his counsel for his defense, and the provision of equal  
6 protection of the law. If this is not being provided, by counsel to the accused,  
7 it is at the Omnibus Hearing that the court ensures that standards regarding  
8 provision of counsel are complied with. Without the Omnibus Hearing the  
9 accused stands alone at the mercy of the prosecution and a defense attorney  
10 who wishes only to secure a plea. In this instance the accused is denied  
11 counsel for his defense, denied his Omnibus Hearing, denied his due process  
12 sand the equal protect ion of the law, violating the accused's 14<sup>th</sup> Amendment  
13 rights.

14 (Dkt. # 4, pp. 9-15).

#### 15 **IV. EXHAUSTION OF STATE REMEDIES**

16 In order to satisfy the exhaustion requirement, Petitioner's federal claims must have been  
17 fairly presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton  
18 v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985).

19 As is more fully discussed below, Petitioner failed to properly exhaust his second and third  
20 claims for relief. In addition, Petitioner's claims are now procedurally barred under Washington  
21 Statutes RCW 10.73.090 (one-year statute of limitations bar) and 10.73.140 (prohibition of filing of  
22 multiple collateral challenges), and these claims are not cognizable in federal court absent a showing  
23 of cause and prejudice or a fundamental miscarriage of justice.

#### 24 **V. EVIDENTIARY HEARING**

25 In a proceeding instituted by the filing of a federal *habeas corpus* petition by a person in  
26 custody pursuant to a judgment of a state court, the "determination of a factual issue" made by that  
27 court "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The Petitioner has "the burden of  
28

1 rebutting the presumption of correctness by clear and convincing evidence.” Id.

2       Where a Petitioner “has diligently sought to develop the factual basis of a claim for habeas  
3 relief, but has been denied the opportunity to do so by the state court,” an evidentiary hearing in  
4 federal court will not be precluded. Baja v. Ducharme, 187 F.3d 1075, 1078-79 (9<sup>th</sup> Cir. 1999), cert.  
5 denied, 120 S.Ct. 798 (2000) (quoting Cardwell v. Greene, 152 F.3d 331, 337 (4<sup>th</sup> Cir. 1998)). If  
6 the Petitioner fails to develop “the factual basis of a claim” in the state court proceedings, an  
7 evidentiary hearing on that claim shall not be held, unless the petitioner shows: (A) the claim relies  
8 on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme  
9 Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously  
10 discovered through the exercise of due diligence; and (B) the facts underlying the claim would be  
11 sufficient to establish by clear and convincing evidence that but for constitutional error, no  
12 reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. §  
13 2254(e)(2).

14       An evidentiary hearing is not required on issues that can be resolved by reference to the state  
15 court record.” Id. (emphasis in original). “It is axiomatic that when issues can be resolved with  
16 reference to the state court record, an evidentiary hearing becomes nothing more than a futile  
17 exercise.” Id.; United States v. Birtle, 792 F.2d 846, 849 (9<sup>th</sup> Cir. 1986) (quoting 28 U.S.C. § 2255).  
18 Petitioner is not entitled to an evidentiary hearing in this Court because, as is discussed below, there  
19 is no indication “that an evidentiary hearing would in any way shed new light” on the grounds for  
20 federal *habeas corpus* relief raised in the petition and the issues raised by Petitioner may be resolved  
21 based solely on the state court record.  
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## VI. STANDARD OF REVIEW

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). 28 U.S.C. § 2254 is explicit in that a federal court may entertain an application for writ of habeas corpus “only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States.” 28 U.S.C. § 2254(a)(1995). The Supreme Court has stated many times that federal habeas corpus relief does not lie for errors of state law. Lewis v. Jeffers, 497 U.S. 764 (1990); Pulley v. Harris, 465 U.S. 37, 41 (1984); Estelle v. McGuire, 502 U.S. 62 (1991).

Further, a habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). A determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

## VII. DISCUSSION

### A. Exhaustion and Procedural Default of Second and Third Claims

In order to satisfy the exhaustion requirement, petitioner’s claims must have been fairly presented to the state’s highest court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). A state prisoner must exhaust state remedies with respect to each claim before petitioning for a writ of habeas corpus in federal court. Granberry v. Greer, 481 U.S. 129, 134 (1987). It is the petitioner’s burden to prove that a claim has been

1 properly exhausted and is not procedurally barred. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th  
2 Cir. 1981). It is not enough that all the facts necessary to support the federal claim were before the  
3 state courts, or that a somewhat similar state law claim was made. In order to exhaust the federal  
4 habeas claim, petitioner must have fairly presented to the state courts the substance of his federal  
5 habeas claim. Anderson v. Harless, 459 U.S. 4, 6-7 (1982) (citations omitted). The petitioner must  
6 present the claims to the state's highest court, even where such review is discretionary. O'Sullivan v.  
7 Boerckel, 526 U.S. 838, 845 (1999).

9 Respondent argues that Petitioner failed to properly exhaust his second and third habeas  
10 claims of the alleged denial of an omnibus hearing.

11 A careful review of Petitioner's state court filings reveals that Petitioner does not raise the  
12 denial of an omnibus hearing as an issue in his personal restraint petition. To the extent the hearing  
13 is mentioned at all, it is in connection with Petitioner's recitation of the proceedings involved in his  
14 case, where he complains of his counsel's failure to appear, preparedness and the need to reschedule  
15 the hearings. (*See Id.*, Exh. 5, Attachment to Page 3, Question 8). The Court of Appeals noted  
16 Petitioner's claims that his counsel had missed some omnibus hearings and did not sufficiently meet  
17 with him in jail, but noted that this was "part of his broader claim that [his counsel] merely pushed  
18 him into a plea bargain without discussing or pursuing a self-defense claim based on the investigator  
19 reports in his file." (*Id.*, Exh. 6 at 4-5 n. 3). Petitioner does not raise the denial of an omnibus  
20 hearing as an issue in his motion for discretionary review in the Washington Supreme Court, but  
21 discusses the failure of his counsel to push for "evidentiary hearings [and] omnibus hearings," in the  
22 "Statement of the Case" portion of his motion. (*Id.*, Exh.7 at 9 (marked as p. 4 by Petitioner)).

23 Petitioner raises the denial of an omnibus hearing as an issue for review for the first time in  
24 his motion to modify the Supreme Court Commissioner's rulings. (*Id.*, Exh. 9 at 8-9).

1 To give state courts an opportunity to properly address his claims, however, Petitioner would  
2 have had to present them, as federal constitutional violations, at every level of state courts' review  
3 and he has not done so. See Ortberg v. Moody, 961 F.2d 135, 138 (9th Cir. 1992) (a petitioner  
4 must properly raise a habeas claim on every level of direct review in order to properly exhaust).

5  
6 To provide the State with the necessary "opportunity" [to pass upon and correct alleged  
7 violation of state prisoner's federal rights] the prisoner must 'fairly present' his claim in  
8 each appropriate state court (including a state supreme court with powers of  
9 discretionary review), . . . alerting that court to the federal nature of the claim.

10 Baldwin v. Reese, 124 S. Ct. 1347, 1349 (2004) (emphasis added) (citations omitted).

11 Accordingly, because Petitioner's second and third habeas claims were not presented as  
12 federal constitutional violations in the Washington Supreme Court, such claims are unexhausted, *see*  
13 Duncan v. Henry, 513 U.S. 364, 365-66 (1995), and should be dismissed.

14 **B. Dismissal of Unexhausted Claims**

15 Federal courts "may not adjudicate mixed petitions for habeas corpus, that is, petitions  
16 containing both exhausted and unexhausted claims." Rhines v. Weber, 125 S. Ct. 1528, 1532-33  
17 (2005). Instead, such petitions "must be dismissed for failure to completely exhaust available state  
18 remedies." Jefferson v. Budge, 419 F.3d 1013, 2005 WL 1949886 \*2 (9<sup>th</sup> Cir. 2005) (citing Rose v.  
19 Lundy, 455 U.S. 509, 518-22 (1982)).

20  
21 As Petitioner's second and third grounds for seeking federal *habeas corpus* relief have not  
22 been fully exhausted, Petitioner has presented a mixed petition containing both exhausted and  
23 unexhausted federal claims, which, in itself requires dismissal of the petition. Before doing so,  
24 generally the Court is required to provide Petitioner with "the choice of returning to state court to  
25 exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted  
26  
27

1 claims to the district court.” Id.; see also Rhines, 125 S. Ct. at 1535; Tillema v. Long, 253 F.3d 494,  
2 503 (9<sup>th</sup> Cir. 2001) (court must provide *habeas corpus* litigant with opportunity to amend mixed  
3 petition by striking unexhausted claims). This is not so, however, where the Petitioner would be  
4 procedurally barred from returning to state court to address the unexhausted claims.  
5

6 The record in this case reflects that Petitioner’s second and third claims are  
7 now procedurally barred. Because Petitioner’s convictions are based on guilty pleas, Petitioner  
8 could not directly challenge them and he has already completed a round of state court challenges.  
9 Thus, Washington Statutes RCW 10.73.090 (one-year statute of limitations bar) and 10.73.140  
10 (prohibition of filing of multiple collateral challenges) prohibit him from returning to the Washington  
11 state courts and filing a new personal restraint petition where he could present these claims as federal  
12 constitutional violations. RCW 10.73.140 and RAP 16.4(d) bar the filing of successive petitions and  
13 petitions raising new claims absent a showing of good cause. Unless Petitioner can show good  
14 cause, the state court will deny any petition he now files under RCW 10.73.140. Shumway v. Payne,  
15 136 Wn.2d 383, 398-99, 964 P.2d 349 (1998).  
16  
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18  
19 **C. Petitioner Cannot Show Cause and Prejudice Or Fundamental Miscarriage of Justice**

20 Unless it would result in a “fundamental miscarriage of justice,” a petitioner who  
21 procedurally defaults may receive review of the defaulted claims only if he demonstrates “cause”  
22 for his procedural default and “actual prejudice” stemming from the alleged errors. Coleman v.  
23 Thompson, 501 U.S. 722, 750 (1991). To show “cause,” the petitioner must show that some  
24 objective factor, external to the petitioner, prevented compliance with the state’s procedural rule.  
25 Id. at 753. “The fact that [a petitioner] did not present an available claim or that he choose to  
26 pursue other claims does not establish cause.” Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306  
27

1 (9th Cir. 1996).

2 A petitioner can demonstrate “cause” by showing interference by state officials, the  
3 unavailability of the legal or factual basis for a claim, or constitutionally ineffective assistance of  
4 counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner cannot demonstrate cause to  
5 excuse a procedural default where the cause is fairly attributable to the petitioner’s own conduct.  
6 McCoy v. Newsome, 953 F.2d 1252, 1258 (11th Cir. 1992). A petitioner’s own inadequacies and  
7 lack of expertise in the legal system do not excuse a procedural default. Hughes v. Idaho State Bd.  
8 of Corrections, 800 F.2d 905, 907-09 (9th Cir. 1986).

9  
10 “[I]n an extraordinary case, where a constitutional violation has probably resulted in the  
11 conviction of one who is actually innocent, a federal habeas court may grant the writ even in the  
12 absence of a showing of cause for the procedural default.” Wood v. Hall, 130 F.3d 373, 379 (9th  
13 Cir. 1997) (quoting Murray v. Carrier, 447 U.S. 478, at 496). “To meet this manifest injustice  
14 exception, [the petitioner] must demonstrate more than that ‘a reasonable doubt exists in the light  
15 of the new evidence.’” Wood, 130 F.3d at 379 (quoting Schlup v. Delo, 513 U.S. 298, at 329  
16 (1995)). The petitioner must also “make a stronger showing than that needed to establish  
17 prejudice,” Schlup, 513 U.S. at 327. “[T]he petitioner must show that is more likely than not that  
18 no reasonable juror would have convicted him in the light of the new evidence.” Id.

19  
20  
21 Petitioner has not provided the court with any evidence of cause and prejudice or a  
22 fundamental miscarriage of justice. Because he cannot excuse his procedural default, his second  
23 and third habeas claims are not cognizable in this federal habeas corpus proceeding.

24  
25 **D. Petitioner’s First Ground for Relief Must be Denied as Trial Counsel Did Not Provide**  
26 **Ineffective Assistance of Counsel**

27 Petitioner’s first ground for relief is based on claims of ineffective assistance of counsel.

1 Petitioner must satisfy the two-part standard of Strickland v. Washington, 466 U.S. 668, 686  
2 (1984), to support a claim of ineffective assistance of counsel. First, the petitioner must show that  
3 counsel's performance was so deficient that it "fell below an objective standard of reasonableness."  
4 Id. at 686. This burden is highly demanding, as the defendant must prove he was denied a fair trial  
5 by the gross incompetence of counsel. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).  
6  
7 Second, the petitioner must show that the deficient performance prejudiced the defense so "as to  
8 deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.  
9 Unless the defendant's showing satisfies both parts of the analysis, "it cannot be said that the  
10 conviction . . . resulted from a breakdown in the adversary process that renders the result  
11 unreliable." Id. Because the petitioner must satisfy both prongs of the Strickland test, a court need  
12 not address both prongs if the petitioner makes an insufficient showing of one prong. Id. at 697.  
13  
14 Judicial review of an attorney's performance is "highly deferential and doubly deferential when it is  
15 conducted through the lens of federal habeas." Yarborough v. Gentry, 124 S. Ct. 1, 4 (Oct. 20,  
16 2003).

17 Under the first prong of the Strickland test, the question is whether counsel's assistance was  
18 reasonable under the totality of the circumstances, viewed as of the time of counsel's conduct.  
19  
20 Strickland, 466 U.S. at 690. To succeed under the first prong, the petitioner must show the  
21 attorney's conduct "reflect[s] a failure to exercise the skill, judgment, or diligence of a reasonably  
22 competent attorney." United States v. Vincent, 758 F.2d 379, 381 (9th Cir.), cert. denied, 474 U.S.  
23 838 (1985).

24 There is a strong presumption that counsel's performance fell within the wide range of reasonable  
25 assistance. Strickland, 466 U.S. at 689.

26 Under Strickland's second prong, to prove prejudice, petitioner must establish a "*reasonable*

1 probability that, but for counsel's unprofessional errors, the results of the proceeding would have  
2 been different." Woodford v. Visciotti, 537 U.S. 19, 22 (2002) (per curiam) (emphasis in the  
3 original) (citing Strickland, 466 U.S. at 694). However, sheer outcome determination is not  
4 sufficient to make out a Sixth Amendment violation. A proper prejudice inquiry focuses on whether  
5 counsel's errors or omissions rendered the proceeding fundamentally unfair or the result unreliable.  
6 Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). "Unreliability or unfairness does not result if the  
7 ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to  
8 which the law entitles him." Id. at 372.

10 The Strickland standard applies to challenges to guilty pleas based on ineffective assistance of  
11 counsel. Hill v. Lockhart, 474 U.S. 52, 58 (1985). Where a defendant is represented by counsel  
12 during plea process and enters a plea upon the advice of counsel, the voluntariness of the plea  
13 depends on whether counsel's advice "was within the range of competence demanded of attorneys  
14 on criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970). Per Hill, the first prong of  
15 Strickland in the plea context is "nothing more than a restatement of the standard of attorney  
16 competence already set in . . . *McMann v. Richardson*..." Hill, 474 U.S. at 58-59 (italics in the text).  
17 To satisfy Strickland's prejudice prong, defendant must show that "there is reasonable probability  
18 that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to  
19 trial." Id. at 59. When in a plea context,

22 offender claims counsel failed to investigate or discover potentially exculpatory  
23 evidence, the determination whether the error prejudiced the defendant by causing him  
24 to plead guilty rather than go to trial will depend on the likelihood that discovery of the  
25 evidence would have led counsel to change his recommendation as to the plea. This  
assessment, in turn, will depend in large part on a prediction whether the evidence likely  
would have changed the outcome of a trial.

26 Hill, 474 U.S. at 59.

1  
2       Petitioner alleges that his counsel's performance was below an objectively reasonable  
3 standard of performance because his counsel had in his possession various records, including Alex  
4 Bolvin's statement to the police, the transcript of Mr. Bolvin's interview with the investigator, and  
5 other investigative records. Petitioner alleges these records call into question the assault charges.  
6 (Dkt. # 4, 10 (page marked as 6b by Petitioner)).  
7

8       Petitioner attached these records to his personal restraint petition. Attachment to Exhibit 5 is  
9 the Handwritten Statement by Mr. Bolvin:

10       . . .Then they [Mr. Lauzan and Mr. Shoop] started arguing and Tim [Lauzan] said I  
11 don't like the way you do business. Then Jener [Shoop] went inside and came back  
12 out w/a bat. Jener hit the bat on a washer and said do you have problem Tim and then  
13 he took a swing at w/the bat Tim grabbed it then they both fell on to the porch then  
14 Jener's rt arm came around and the next thing I knew Tim rolled off porch bleeding . .

15 (Dkt. # 15, Exh. 5, Attach. Evidence 1B.)(emphasis added).

16       The transcribed interview with Mr. Bolvin conducted by the investigator hired by Petitioner is  
17 consistent with Mr. Bolvin's written statement to the police. (Id., Exh. 5, Attach. Evidence 5A, p. 1-  
18 9). Petitioner left the porch and spent some time rummaging around in the house "like he was  
19 digging out something and just boxes flying everywhere." (Id. at 5). He then came out of the house  
20 with a bat in his hand, which he smacked on the washer and said, "you don't like the way I do  
21 business." (Id. at 6). When the victim stepped forward, Petitioner swung the bat at him. (Id.). The  
22 victim grabbed the bat and he and Petitioner fell down on the porch. (Id.) Mr. Bolvin stated he did  
23 not see the knife in Petitioner's hand. (Id. at 8). However, the victim told him later that he was  
24 stabbed and Mr. Bolvin noticed later that the victim had been cut. (Id. at 8).

25       A fair reading of the written statement is that Petitioner was the first aggressor. He left the  
26 scene and returned to attack the victim with a bat and then with a knife. Mr. Bolvin's written  
27



1 statement thus confirms that, although the victim was arguing with Petitioner, Petitioner attacked the  
2 victim first. The interview of Mr. Bolvin conducted by Petitioner's own investigator does nothing to  
3 change the picture of Petitioner as the first aggressor.

4 Respondent argues that counsel's recommendation to plead guilty was objectively reasonable.  
5 If the case had gone to trial, Petitioner would most likely be convicted, based on the available  
6 records and the facts of the assault case. His prior convictions included residential burglary, second-  
7 degree burglary and forgery. (*Id.*, Exh. 14). Therefore, if Petitioner testified at trial, he would be  
8 impeached because those convictions involved crimes of dishonesty. Washington ER 609(a).  
9

10 The record reflects that the investigation did not reveal anything that counsel could have used  
11 to present a viable self-defense strategy. The witness statements supported the State's version that  
12 Petitioner was the aggressor and did not act in self-defense. Accordingly, Petitioner cannot show he  
13 would have insisted on going to trial in the assault case rather than pleading guilty. *Hill*, 474 U.S. at  
14 59.  
15

16 The companion residential burglary case must also be considered in determining whether  
17 Petitioner has shown prejudice from the alleged failings of his lawyer. Petitioner was initially  
18 charged with the first-degree burglary with a deadly weapon enhancement, second-degree assault,  
19 attempting to elude a pursuing police vehicle, and obstructing a law enforcement officer. (*Id.*, Exh.  
20 15). As the result of his counsel's plea bargain negotiation, Petitioner was charged only with the  
21 residential burglary with deadly weapon enhancement. Had Petitioner gone to trial on the original  
22 charges he risked being convicted of four felonies, which would have significantly increased his  
23 standard sentencing range. The plea bargain resulted in the State dropping first-degree burglary,  
24 second-degree assault, attempting to elude, and the obstruction of a law enforcement officer charges.  
25 Thus, rejecting the plea offer would mean conviction on the more serious four felonies **even if** the  
26  
27  
28

1 Court assumes that Petitioner would have been acquitted of the assault charge<sup>1</sup>.

2 Accordingly, Petitioner cannot show prejudice as he cannot show that he would have insisted  
3 on going to trial in the assault case rather than pleading guilty. Hill, 474 U.S. at 59.

4 The Washington Court of Appeals and Supreme Court denied Petitioner's ineffective  
5 assistance claim on the merits. The Washington Court of Appeals held as follows:

7 When a defendant or petitioner challenges a guilty plea based on a claim of  
8 ineffective assistance of counsel, he or she must meet the two-prong *Strickland v.*  
9 *Washington*<sup>2</sup> test. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366; 88 L. Ed. 2d 203  
10 (1985); *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993).  
11 Thus, Petitioner must first demonstrate that his lawyer's representation fell below an  
12 objectively measured standard of reasonableness. *Hill*, 474 U.S. t 57; *In re Pers.*  
13 *Restraint of Clements*, 125 Wn. App. 634, 646, 106 P.3d 244, *review denied*, 154  
14 Wn.2d 1020, *cert denied*, 126 S. Ct. 745 (2005). To demonstrate prejudice, petitioner  
15 must show that his lawyer's "constitutionally ineffective performance affected the  
16 outcome of the plea process" by showing "that there is a reasonable probability that,  
17 but for counsel's errors, he would not have pleaded guilty and would have insisted on  
18 going to trial." *Hill*, 474 U.S. at 59; *accord Riley*, 122 Wn.2d at 780-81.

19 But a bare assertion by Petitioner that he would have insisted on going to trial  
20 does not meet the "reasonable probability" standard for demonstrating prejudice.  
21 *Clements*, 125 Wn. App. at 646-47; *see Riley*, 122 Wn.2d at 782. Instead,

22 In many guilty plea cases, the "prejudice" inquiry will closely resemble the  
23 inquiry engaged in by courts reviewing ineffective-assistance challenges to  
24 convictions obtained through a trial. For example, where the alleged error of  
25 counsel is a failure to investigate or discover potentially exculpatory  
26 evidence, the determination whether the error "prejudiced" the defendant by  
27 causing him to plead guilty rather than go to trial *will depend on the*  
28 *likelihood that discovery of the evidence would have led counsel to change*  
*his recommendation as to the plea*. This assessment, in turn, will depend in

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29 <sup>1</sup>The Washington Court of Appeals calculated the difference in sentences – by choosing to  
30 accept the offer, Petitioner pleaded guilty to two charges instead of four and received sentences  
31 totaling 87 months. The sentence imposed thus represented a reduction of at least 36 months to as  
32 much as 159 months from the risk Petitioner faced if convicted of all charges. It was also at least 24  
33 months less than if he had been convicted only of the original charges in the second cause [burglary  
34 charges]. Had Petitioner not been sentenced at the same hearing, the sentencing court would have  
35 had discretion to impose consecutive sentences. (Dkt. # 15, Exh. 6, at 7 & n.5).

36 <sup>2</sup>466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) [footnote in the text].

large part on a prediction *whether the evidence likely would have changed the outcome of a trial*. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the “prejudice” inquiry will depend largely on *whether the affirmative defense likely would have succeeded at trial*.

*Hill*, 474 U.S. at 59 (emphasis added); *accord Clements*, 125 Wn. App. at 646.

As with any ineffective assistance claims, this court “must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance.” *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997). And, because Petitioner must establish both prongs of the *Strickland-Hill* test, we can deny relief if he fails to prove one prong without the need to evaluate the other. *See Riley*, 122 Wn.2d at 780.

#### FACTUAL BACKGROUND

Here, Shoop asserts that his lawyer, Varn Chandola, represented him in two separately filed causes, the second degree assault (cause 03-1-04115-9) he challenges and a residential burglary (cause 04-1-01100-2). He further asserts that a previous lawyer, Karen Lundahl, hired a private investigator to look for evidence of self-defense in the assault case. The investigator interviewed several witnesses: Petitioner, Jan Shoop (Petitioner’s wife), Richard Sorrels (Petitioner’s landlord and former step-father), and Alex Bolvin (present with victim at time of assault). Petitioner asserts that after taking over his defense, Chandola did not show him or inform him of the investigator’s written report of these interviews.<sup>3</sup> Noting that the assault happened at his residence when the victim and Bolvin came there to collect a debt, Petitioner characterizes these reports as supporting a strong defense of self-defense because they show that the victim was confrontational, had a history of showing up unwanted, and had been previously told to leave Petitioner’s residence.

Petitioner asserts that despite having evidence of a strong defense, Chandola merely urged him to plead guilty to both the assault and the residential burglary because the concurrent sentence for the assault would be subsumed within the sentence for residential burglary, except for the deadly weapon enhancements, which would be consecutive. Petitioner claims that had Chandola shown him the investigator’s reports and discussed with him the potential for a self-defense verdict, he would not have pleaded guilty to the assault. Petitioner claims prejudice because without the assault conviction, his standard range for the residential burglary would have been lower and he

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<sup>3</sup> Petitioner also asserts that Chandola missed some omnibus hearings and did not sufficiently meet with him in jail. This, however, is part of his broader claim that Chandola merely pushed him into a plea bargain without discussing or pursuing a self-defense claim based on the investigator reports in his file [footnote in the text].

1 would not have a conviction for a serious or “strike” offense. Petitioner does not claim  
2 that he would not have pleaded guilty to the residential burglary, nor does this petition  
3 challenge that conviction.

4 While partly correct, Petitioner’s factual recitation omits a large number of  
5 crucial details, which are provided by the attachments to the State’s response. The State  
6 originally charged Petitioner with only the second degree assault in cause 03-1-04115-  
7 9. Petitioner failed to appear for hearings in December 2003 and January 2004, and the  
8 trial court issued a warrant for his arrest. Petitioner’s lawyer, Karen Lundahl, who had  
9 hired the investigator to explore Petitioner’s self-defense theory, then withdrew in  
10 February 2004.

11 On March 4, 2004, Tacoma Police arrested Shoop for several new crimes, and  
12 on March 5, 2004, the State charged Shoop in cause 04-1-01100-2 with first degree  
13 burglary (with a deadly weapon enhancement), second degree assault, attempting to  
14 elude a pursuing police vehicle, and obstructing a law enforcement officer. The  
15 probable cause statement filed with this charge reveals that Shoop admitted  
16 participating in a burglary in which an accomplice was armed with a knife, admitted  
17 driving the get-away vehicle both when it deliberately rammed an occupied police car  
18 and thereafter, as it recklessly attempted to avoid capture. It also reveals that petitioner  
19 fled police on foot after the car finally stopped. A witness saw Petitioner and others  
20 break into the apartment, and a witness and police saw Petitioner removing items from  
21 the building. The police observed Petitioner’s driving and the knife in the possession of  
22 one of the other burglary participants. The probable cause statement also reveals that  
23 Jan Shoop, a witness upon whom Petitioner now relies, (1) was present in the get-away  
24 car and (2) lied to the police about her identity and connection to Petitioner.

25 His previous lawyer having withdrawn when Petitioner failed to appear, the  
26 trial court appointed a new lawyer, Chandola, to represent Petitioner on both the  
27 original assault charge and the new set of more serious charges. Chandola filed his  
28 appearance in cause 04-1-01100-2 on March 8, 2004, and filed his appearance in the  
original cause (03-1-04115-9) on March 25, 2004.

Chandola’s efforts on Petitioner’s behalf then resulted in the State’s offer to  
reduce the first degree burglary to residential burglary and to dismiss the remaining  
counts of 04-1-01100-2 if Petitioner pleaded guilty to the residential burglary and to  
the second degree assault in 03-1-04115-9, along with the deadly weapon  
enhancements on each charge. This offer had the effect of reducing Petitioner’s  
offender score on the original second degree assault to “8,” reducing his presumptive  
range from one of 63 to 84 months to one of 53 to 70 months. *See* RCW 9.94A.510,  
.515, .525. More significantly, by reducing the burglary charge, the offer reduced  
Petitioner’s presumptive range for the burglary from one of 87 to 116 months to one  
of 63 to 84 months; the reduction also reduced the burglary deadly weapon

enhancement from two years to one year.<sup>4</sup>. See RCW 9.94A.510, .515, . 525, . 533(4).

Without the offer, Petitioner faced the risk of conviction of four felonies, two of them most serious or “strike” offenses. See RCW 9.94A.030(28). If convicted after trial of all four, with the charged enhancements, Petitioner’s standard range (including consecutive enhancements) if sentenced on both causes at the same hearing would have been 123 to 152 months. See RCW 9.94A.510, .515, . 525, . 533(4). If sentenced in separate hearings (likely if convicted in separate trials), Petitioner would have faced a sentencing range (including enhancement) on the original assault of 75 to 96 months which could have been *consecutive*<sup>5</sup> to a sentencing range (including enhancement) on the first degree burglary of 111 to 140 months, for a total of 186 to 246 months. See RCW 9.94A.510, .515, . 525, . 533(4), .589(1)(a), .589(3). Even if acquitted in cause 03-1-04115-9 but convicted of all three felonies in cause 04-1-01100-2, Petitioner’s standard range (with deadly weapon enhancement) would have been 111 to 140 months.

Petitioner chose to accept the offer, pleaded guilty to two charges instead of four,<sup>6</sup> and received sentences totaling 87 months. The sentence imposed thus represented a reduction of at least 36 months to as much as 159 months from the risk Petitioner faced if convicted of all charged. It was also at least 24 months less than if he had been convicted only of the original charges in the second cause, 04-1-01100-2.

#### DEFICIENT PERFORMANCE PRONG

Petitioner’s claim of ineffective assistance of counsel is premised on his assertion that Chandola failed to show him or discuss with him the investigative materials obtained by his earlier lawyer Lundahl. Petitioner’s only support for this claim is his own unsworn claims in his petition; he has not included any sworn statement from Chandola or from anyone else to corroborate his assertion.

Moreover, Petitioner’s claim that he did not know about the investigator or about the self-defense evidence in Chandola’s file at the time of his guilty plea is suspect. As the material submitted by Petitioner makes clear, Lundahl (the earlier lawyer) hired the investigator because *Petitioner* told her that he had acted in self-

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<sup>4</sup>The offer did not reduce Petitioner’s offender score for the burglary because it was the maximum of “9” even without the additional assault and eluding convictions. Without the offer, Petitioner’s score on both the original assault and the burglary would have exceeded 9. [Footnote in text].

<sup>5</sup>The sentencing court would have had discretion to impose consecutive sentences if the two causes were not sentenced at the same hearing. See RCW 9.94A.589(1)(a), .589(3). [Footnote in text].

<sup>6</sup>The state charged Petitioner with one class A felony, two class B felonies, one class C felony, and one gross misdemeanor. RCW 9A.36.021(2)(a), .52.030(2), .76.020(3), 46.61.024(1). He pleaded guilty to two class B felonies only. RCW 9A.36.021(2)(a), .52.025(2). [Footnote in text].

1 defense. The investigator contacted witnesses identified by *Petitioner*. The  
2 investigator *interviewed Petitioner* and his report of that interview is among the  
3 reports *Petitioner* now submits as documents of which he was unaware, purportedly  
4 because of Chandola's failings. Another of the interviews now submitted was with Jan  
5 Shoop, *Petitioner's* wife, with whom he has been and is in close contact. The  
6 investigator completed his reports while Lundahl was still representing *Petitioner* and  
7 before *Petitioner* failed to appear for court.

8 But this court need not (and does not) conclusively decide whether *Petitioner*  
9 has established the deficient performance prong, because he clearly fails to establish  
10 prejudice.

### 11 PREJUDICE PRONG

12 As noted above, in evaluating whether *Petitioner* has established prejudice  
13 from the purported failings of his lawyer, this court must determine whether the self-  
14 defense evidence he now submits would likely have succeeded at trial and whether it  
15 would have changed his lawyer's advice to accept the State's offer. First, the evidence  
16 submitted is not as strong as *Petitioner* apparently believes. Indeed, the investigator's  
17 interview with Bolvin, the only person other than *Petitioner* and victim present during  
18 the altercation, while establishing that the victim was angry and argumentative, also  
19 directly contradicts *Petitioner* by making it clear that victim did not touch *Petitioner*  
20 before he armed himself and that *Petitioner* then swung his weapon at victim before  
21 victim made any physical contact. Bolvin told the investigator that *Petitioner*  
22 responded to the victim's verbal confrontation by retrieving a baseball bat, banging  
23 the bat on a nearby washing machine, and swinging the bat hard at the victim. Bolvin  
24 did not see the knife, but saw the cut on the victim.

25 And the other statements submitted by *Petitioner* are even less helpful; neither  
26 Jan Shoop nor Richard Sorrels witnessed the altercation. Jan Shoop's statement does  
27 not establish that *Petitioner* knew of past acts of violence by the victim, but just that  
28 she felt the victim was an intimidating person and that he had come unannounced and  
unwelcome to her and *Petitioner's* residence in the past. And, of course, Ms. Shoop's  
testimony would not be very credible at trial, given her presence at *Petitioner's*  
burglary, her admitted lies to the police, and her relationship to *Petitioner*. Mr. Sorrels  
had a negative opinion of *Petitioner* and simply knew that he had told two apparent  
friends of *petitioner* (one of whom shared a first name with the victim) to leave  
*Petitioner's* residence in the past because he believed *Petitioner* and his friends to  
have criminal inclinations.

At a trial of the second degree assault charge, *Petitioner* would have been able  
to establish a basis for self-defense only with his own testimony; the State could then



1 impeach him with his multiple prior crimes of dishonesty.<sup>7</sup> See ER609(a). And, given  
 2 the likely testimony of Bolvin, the State would have been entitled to a “first  
 3 aggressor” instruction; a jury finding that Petitioner was the first aggressor would  
 4 have completely defeated his self-defense claim. See, e.g., *State v. Wingate*, 155  
 Wn.2d 817, 821-23, 122 P.3d 908 (2005). This court cannot say that a self-defense  
 claim based on the submitted statements would have likely succeeded.

5 Moreover, the more important question is whether a reasonable competent  
 6 lawyer would have advised Petitioner to go to trial based on this self-defense evidence  
 7 rather than accept the State’s offer. The answer is clearly “No.” Even if one assumes  
 8 that the self-defense evidence made acquittal on the original assault charge likely (but  
 9 not certain), rejecting the offer would mean facing near certain conviction on the  
 much stronger and more serious second set of charges alone would have resulted in a  
 longer standard range sentence, and if convicted in both causes, Petitioner potentially  
 faced very lengthy consecutive sentences.

10 Because of the risks of trial for Petitioner, Chandola’s advice to plead guilty  
 11 to the State’s offer was reasonable and competent, even giving full credit to the self-  
 12 defense evidence. His advice guaranteed Petitioner concurrent sentences and secured  
 13 a better result than if he had been acquitted for the assault he challenges but convicted  
 of the well-supported original charges in the second cause. Petitioner benefited from  
 Chandola’s advice and he cannot establish prejudice.<sup>8</sup>

14 (Id., Exh. 6 at 2-10).

15 In its decision, the Washington Supreme Court held as follows:

16  
 17 Mr. Shoop first argues that the chief judge improperly “combined” his assault  
 18 conviction with a residential burglary conviction (entered the same day under a  
 19 separate cause number) by suggesting that, had Mr. Shoop gone to trial on the assault  
 20 charge, one of the witnesses who purportedly would have supported his self-defense  
 claim, Jan Shoop, would have been impeached by the fact that she was with Mr.  
 Shoop in the car fleeing from the scene of the burglary and had lied to the police  
 about her identity and her relationship with Mr. Shoop. Mr. Shoop urges that the  
 circumstances of the burglary could not have been used to impeach the witness with  
 respect to the assault because the burglary occurred several months after the assault.  
 But for impeachment purposes, this does not matter. At trial on the assault, the State

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23  
 24 <sup>7</sup>Taking a motor vehicle without permission, two forgery convictions, and (depending on the underlying  
 25 crime), residential burglary, second degree burglary, and attempted burglary. See ER 609(a). [Footnote in text].

26 <sup>8</sup>Moreover, as noted above, Petitioner was personally aware of the witnesses contacted by the investigator and  
 27 of the nature of their statements, with or without discussion with Chandola. He could have insisted on going to trial  
 based on that information, but shoe not to do so. His guilty plea statement specifically admits the intentional cutting of  
 the victim with a knife. [Footnote in text].

1 could have impeached the witness by any act she committed *prior to trial* that  
2 reflected negatively on her credibility. *See* ER 608(b). Contrary to Mr. Shoop's claim,  
3 this would not be an ex post facto violation.

4 Mr. Shoop also takes issue with the chief judge's discussion of the value of  
5 the plea deal in evaluating defense counsel's performance. The chief judge noted that,  
6 had Mr. Shoop gone to trial on both cause numbers, he would have risked conviction  
7 of two "strike" offenses; specifically, two second degree assaults. Mr. Shoop argues  
8 that the chief judge erred because second degree assault is not a "most serious  
9 offense" under the persistent offender statute. He is wrong. *See* RCW  
10 9.94A.030(28)(b) (second degree assault a most serious offense).

11 Mr. Shoop next disputes the chief judge's observation that, had Mr. Shoop  
12 not agreed to plead guilty to one count of second degree assault, he would have faced  
13 "near certain conviction on the much stronger and more serious second set of  
14 charges." Mr. Shoop asserts that this observation is wrong because he faced no more  
15 serious a charge than second degree assault. But the chief judge plainly was referring  
16 to a more serious "set" of charges, not any single charge. Had Mr. Shoop not pleaded  
17 guilt to one count of second degree assault, he would have been tried additionally for  
18 first degree burglary with a weapon enhancement, attempting to elude a pursuing  
19 police vehicle, obstructing a law enforcement officer, and a second count of second  
20 degree assault. The chief judge therefore correctly characterized these charges as a  
21 more serious "set" of charges.

22 Mr. Shoop finally argues that the chief judge erroneously stated that only by  
23 his own testimony could Mr. Shoop have supported his self-defense claim. But the  
24 chief judge noted that the statement of the only witness to Mr. Shoop's altercation  
25 with the victim did not establish self-defense.<sup>9</sup> Mr. Shoop demonstrates no error.

26 In sum, Mr. Shoop does not show that the chief judge obviously or probably  
27 erred or departed from the usual course of proceedings. The motion for discretionary  
28 review is therefore denied.

29 (Id., Exh. 8 at 1-3).

30 This Court is not aware of any United States Supreme Court case that would, under the same  
31 factual scenario, render a result opposite to that reached by the Washington state courts. Thus, their  
32 adjudication of the claim on the merits cannot be contrary to, or an unreasonable application of,

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33 <sup>9</sup>The chief judge made this remark in assessing the potential prejudice from any claimed deficiencies in  
34 defense counsel's performance. She noted that only Mr. Shoop's testimony would have supported self-defense and that  
35 the State would have impeached Mr. Shoop with his prior crimes of dishonesty, making it unlikely that any self-  
36 defense claim would have succeeded. [Footnote in text].



1 clearly established federal law, as determined by the United States Supreme Court. *See, Dows v.*  
2 *Wood*, 211 F.3d 480, 486 (9th Cir. 2000). Here, the record clearly reflects that Petitioner had an  
3 extremely thin self-defense case to the assault charge and that his counsel negotiated a plea-bargain  
4 in the companion case resulting in a lesser single charge of residential burglary from the original four  
5 felony charges.  
6

7 Moreover, the record reflects that Petitioner voluntarily and intelligently pled guilty to the  
8 crimes of second degree assault and residential burglary with deadly weapon enhancements. On May  
9 19, 2004, he signed his guilty plea on his residential burglary charge, stating:

10 On March 4<sup>th</sup> in Tacoma WA I entered a dwelling with intent to take property on 614  
11 So. G St. and my accomplice had a knife.

12 (*Id.*, Exh. 11).

13 On the same day, in Petitioner's written plea of guilty in the assault case he stated:

14 I got into a fight w/Tim Lauzan and intentionally cut him with a knife on Aug 19 2003  
15 in Pierce Co WA.

16 (*Id.*, Exh. 12).

17 During the guilty plea colloquy, Petitioner affirmatively responded to the judge's questions  
18 whether he understood the nature of the crimes he was charged with, the standard sentencing ranges,  
19 and that he would get mandatory deadly weapon enhancements. (*Id.*, Exh. 13). Petitioner confirmed  
20 the statements in the written guilty pleadings were his. (*Id.* at 7-8). He denied anybody made threats  
21 or promises to induce him to plead guilty. (*Id.* at 7). Petitioner also made the following statement:

23 I just wanted to say that I feel it's vitally important that I apologize to my wife  
24 and to my family and friends for some of the people that I chose to associate with and  
25 the poor choices that I made. With great conviction, I wholeheartedly apologize to  
the community as well as the Court.

26 I would like you to know that I apologize not as a child under the punishment  
27 of authority but as a man taking authority of his punishment. I'm going to use this

1 time to strengthen my walk with god and gain a better understanding of what makes a  
2 person such as myself fall short of what we should all know is a smarter choice and a  
3 better way of thinking. I will seek out classes, education and the church, anything that  
4 presents itself as an opportunity, an opportunity that will allow me to turn this prison  
sentence into a tool that may some day help others in the community, rather than just  
be a hindrance.

5 (Id., Exh. 13 at 12).

6 These records reflect that Petitioner made an intelligent and voluntary choice to plead guilty;  
7 that he was aware of the nature of his crimes, the recommended sentence, and that he was  
8 remorseful.  
9

### 10 **VIII. CONCLUSION**

11 There is nothing in the record or the state courts' decisions to lead this Court to conclude in  
12 its independent judgment that the state courts applied Strickland incorrectly. Petitioner demonstrates  
13 neither deficient performance nor that but for his attorney's mistakes he would not have plead guilty  
14 and would have insisted on going to trial. Because the decision by the Washington state courts as to  
15 Petitioner's first ground for relief was neither contrary to nor an unreasonable application of clearly  
16 established federal law, the undersigned recommends that Petitioner's first claim to habeas relief be  
17 dismissed with prejudice.  
18

19 The undersigned recommends that Petitioner's second and third claims for habeas relief also  
20 be dismissed with prejudice as they are unexhausted. Petitioner failed to present these claims as  
21 federal constitutional violations at every level of state courts' review and he is now procedurally  
22 barred from presenting these claims to the Washington state courts.  
23

24 A proposed Order accompanies this Report and Recommendation.  
25

26 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,  
27

1 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
2 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
3 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time  
4 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **April 6,**  
5 **2007**, as noted in the caption.  
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7  
8 DATED this 6<sup>th</sup> day of March, 2007.

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11 Karen L. Strombom  
12 United States Magistrate Judge  
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